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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1201

MOBIL OIL CORPORATION,

Appellant

v.

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

On Appeal From The Supreme
Court of Vermont

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The Commissioner of Taxes of Vermont, the Appellee, submits this statement in opposition to jurisdiction in this Court of the above-captioned cause. The Jurisdictional Statement submitted by Mobil Oil Corporation, the Appellant, invokes jurisdiction under 28 U.S.C. §1257(2). The Appellee opposes jurisdiction based on the decisions and rules of this Court which limit jurisdiction to substantial federal questions which have been properly raised

in the proceedings below. The Appellant's claims of extra-territorial taxation in violation of the Due Process Clause and taxation of foreign commerce in violation of the Commerce Clause were not properly raised in the proceedings below. The Appellant's claim that the tax in dispute exposed its dividend income to the risk of multiple taxation and, therefore, discriminated against interstate commerce in violation of the Commerce Clause, does not raise a substantial federal question.

For the foregoing reasons, the Appellee moves this Court for an order dismissing this cause, or in the alternative, affirming the decision below.

STATEMENT OF THE CASE

Vermont imposes an annual tax on the apportioned net income of every corporation, domestic and foreign, doing business in Vermont. A corporation's taxable income for federal income tax purposes, with certain adjustment not here in issue, is treated as its Vermont net income.[1]

[1] 32 V.S.A. §5811(18), reproduced as part of Appendix E to Appellant's Jurisdictional Statement, at page 35a.

If a corporation's business is not conducted entirely within Vermont, the Statute imposes a tax only on that portion of its net income which fairly and equitably reflects its business activities in Vermont.[2]

Vermont uses the standard three-factor formula which apportions net income on the basis of property, payroll and sales. Specifically, the percentage of net income which is apportioned to business activities in Vermont is calculated as the arithmetic average of the percentages of a corporation's total payroll, property and sales which are attributable to business activities in this State.[3] The Vermont tax is imposed on a corporation's net income apportioned to Vermont. For example, if the arithmetic average of Mobil's payroll, property and sales attributable to its marketing activities in Vermont was 1%, then 1% of its net income would be apportioned to and taxed by Vermont.

[2] 32 V.S.A. §5833, reproduced as part of Appendix E to Appellant's Jurisdictional Statement, at pages 35a and 36a.

[3] Id.

The facts are not in dispute. Mobil is a New York corporation which markets petroleum and related products in Vermont. For the years in question, the Vermont Department of Taxes correctly determined: (a) the amount of Mobil's Vermont net income (federal taxable income); (b) the amount of Mobil's total property, payroll and sales; (c) the percentages of Mobil's property, payroll and sales attributable to business activities in Vermont; (d) the arithmetic average of Mobil's property, payroll and sales attributable to business activities in Vermont; and (e) an apportionment of Mobil's net income to Vermont which fairly reflected its business activities in Vermont.

The sole question before this Court is whether the Commerce Clause precludes Vermont from including in net income dividends included in Mobil's taxable income for federal purposes. While Mobil admits, on the one hand, that the Vermont tax was imposed only on that portion of its net income which fairly reflected its business activities in Vermont, it argues, on the other hand, that dividends

are entitled to special protection under the Commerce Clause, and, therefore, must be excluded from its net income for Vermont tax purposes.

For the tax years 1970, 1971 and 1972, Mobil filed Vermont income tax returns reporting as its net income, federal taxable income, reduced by the amount of dividends received from subsidiary and non-subsidiary corporations.[4] The Department of Taxes added back to Mobil's net income the amounts of improperly excluded dividends, applied Mobil's calculated apportionment factor to its actual net income and assessed the Vermont tax on that part of Mobil's net income apportioned to Vermont.[5] Mobil appealed that assessment to the Commissioner of Taxes (the "Commissioner"). The Commissioner upheld

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[4]Mobil also excluded from net income reported to Vermont other component items of net income not here in dispute.

[5]Additional adjustments were made by the Department of Taxes which are not here in issue.

the assessment.[6] Mobil appealed the Commissioner's Determination to the Washington Superior Court which held that the assessment subjected Mobil's dividend income to a risk of multiple taxation forbidden by the Commerce Clause.[7] The Commissioner appealed the decision of the Washington Superior Court to the Vermont Supreme Court. Mobil filed no notice of appeal from the decision of the Washington Superior Court.

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[6]The Determination of Appeal is reproduced as Appendix A to Appellant's Jurisdictional Statement, at pages 1a through 13a.

[7]The Orders of the Washington Superior Court, dated January 6, and June 9, 1977, are reproduced as Appendices B and C to Appellant's Jurisdictional Statement, at pages 14a through 18a. Mobil raised additional issues in the proceedings before the Commissioner and the Washington Superior Court which are not here in issue.

In the proceedings before the Vermont Supreme Court, the sole issue properly raised and decided was whether the record supported the Superior Court's decision that the Vermont tax exposed Mobil's dividend income to a risk of multiple taxation forbidden by the Commerce Clause.

ARGUMENT

I. MOBIL DID NOT PROPERLY RAISE IN THE PROCEEDINGS BEFORE THE VERMONT SUPREME COURT ITS CLAIM THAT THE VERMONT TAX WAS IMPOSED ON EXTRA-TERRITORIAL VALUES IN VIOLATION OF THE DUE PROCESS CLAUSE.

This Court has consistently refused to accept jurisdiction except over substantial federal questions which were properly raised in the proceedings below. Rule 15 requires that:

> "1. The jurisdictional statement required by paragraph 2 of Rule 13 shall contain:
>
> (d)....If the appeal is from a state court, the statement of the case shall also specify the stage in the proceedings in the court of first instance, and in the appellate court,

at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them...; and the way in which they were passed upon by the court;...."

Whether a federal question was properly raised in the proceedings below is determined by state practice. Central Union Co. v. Edwardsville, 269 U.S. 190, 194-5 (1925); Pennsylvania R. Co. v. Illinois Brick Co., 297 U.S. 447, 462-3 (1936).

It is well-established law in Vermont that the timely filing of a notice of appeal is a prerequisite to creating appellate jurisdiction. The Vermont Rules of Appellate Procedures clearly state this jurisdictional requirement:

"Except as provided in this subdivision, an appeal permitted by law as of right shall be taken by filing a notice of appeal with the clerk of the [Superior] or District Court and paying to him any entry fee required under 32 V.S.A. §1431 within the time allowed by Rule 4. Failure of an appellant to take any step other than

the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal." V.R.A.P. 3(b)

"In any civil or criminal case in which an appeal is permitted by law as of right, the notice of appeal required by Rule 3 shall be filed with the clerk of the [Superior] or District Court within 30 days of the date of the entry of the judgment or order appealed from....If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires...." V.R.A.P. 4

The Reporter's notes to V.R.A.P. 3 state, in part:

"[Rule 3(a)] makes clear that appeal under these rules is the sole means of review of a lower court judgment...."

The Reporter's notes to V.R.A.P. 4 state, in part:

> "Rule 4(a),..., provides that the notice of appeal must be filed within 30 days of the entry of judgment. Filing of a timely notice gives other parties an additional 14 days in which to file cross appeals,...."

The Vermont Supreme Court has consistently held that the timely filing of a notice of appeal is a prerequisite to creating appellate jurisdiction. Harvey v. Waitsfield, (Decision handed down February 14, 1979); Tunbridge v. Young, (Order filed October 30, 1978); F. M. Burlington Company -- Mondev Burlington, Inc. d/b/a Burlington Square v. Commissioner of Taxes, 134 Vt. 515, 365 A.2d 531 (1976); Allen v. Vermont Employment Security Board, 133 Vt. 166, 333 A.2d 122 (1974); State v. Brown, 121 Vt. 459, 69 A.2d 879 (1960).

The Vermont Supreme Court most recently articulated this requirement in the following terms:

> "Since this Court has many times held that failure to file the notice of appeal within the prescribed time period deprives the tribunal appealed to of jurisdiction over the appeal,

> Northfield v. Chittenden Trust Co., 128 Vt. 240, 241, 260 A.2d 406 (1969), it goes without saying that an entire failure to file a notice of appeal must also foreclose such review." Harvey v. Waitsfield, (Decision handed down February 14, 1979.)

Because Mobil filed no notice of appeal to the Vermont Supreme Court from the decision of the Washington Superior Court, appellate jurisdiction over any claim it might have asserted lapsed on July 9, 1977, 30 days after the entry of that decision. Therefore, Mobil's claim that it raised the issue of extra-territorial taxation in violation of the Due Process Clause in the proceedings below is totally without merit. Mobil's contention that it revived appellate jurisdiction by making the self-serving claim in its brief to the Court below that it did not intend to waive that claim, is also without merit. It is respectfully suggested that an untimely unilateral assertion of jurisdiction cannot create jurisdiction.

Even if Mobil had created appellate jurisdiction over its Due Process claim in the Vermont Supreme Court, it nonetheless failed to properly raise that issue in the proceedings before that Court. The Vermont Supreme Court has consistently held that it will not consider issues not briefed and argued. Tellarico v. Brett, (decision handed down February 6, 1979); In re: Smith, Bell & Hauck Real Estate, Inc., 132 Vt. 295, 318 A.2d 183 (1974); In re: Wright, 131 Vt. 473, 490, 310 A.2d 1, 10 (1973).

Therefore, it is respectfully submitted that for the foregoing reasons Mobil failed to properly raise its claim of extraterritorial taxation in violation of the Due Process Clause in the proceedings below.

II. MOBIL DID NOT PROPERLY RAISE IN THE PROCEEDINGS BELOW ITS CLAIM THAT THE FOREIGN SOURCE OF THE DIVIDENDS AT ISSUE IS A FACT OF CONSTITUTIONAL SIGNIFICANCE UNDER THE COMMERCE CLAUSE.

The Washington Superior Court held simply that the Vermont tax exposed

Mobil's dividends to a prohibited risk of multiple taxation, the Superior Court attributed no constitutional significance to the foreign source of the earnings from which those dividends were paid. Accordingly, Mobil's failure to appeal from the decision of the Washington Superior Court foreclosed appellate jurisdiction in the Vermont Supreme Court.[8]

Mobil's failure to properly raise both the Due Process issue and the foreign source income--Commerce Clause issue is clearly reflected in the decision below, which states the proceedings and the issue presented, as follows:

> "Mobil appealed the deficiencies to the Commissioner under the provisions of 32 V.S.A. §5833(b). A hearing was held at which time Mobil asserted that the assessments violated the terms of the tax statute, 32 V.S.A. §5833, the Due Process Clause of the Fourteenth Amendment, and the Interstate and Foreign Commerce Clause of Article

[8] See, generally, cases cited in Argument I at pages 7 through 12, supra.

I, Section 8 of the United States Constitution. The Commissioner rejected all grounds of invalidity asserted and affirmed the action of the Department of Taxes.

Upon appeal, the superior court reversed on the sole ground that the tax as applied violated the prohibition against multiple taxation contained in the Commerce Clause. As the superior court correctly noted in its order, the legal questions concerning apportionment and due process had already been answered adversely to Mobil's contentions by recent decisions of this Court. (Citations omitted.)

The single question presented here is: Does Vermont's application of its apportioned net income tax to the investment income in issue constitute multiple taxation prohibited by the Commerce Clause?"[9] (Emphasis added.)

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[9]The opinion of the Vermont Supreme Court is reproduced as Appendix C to Appellant's Jurisdictional Statement, at pages 19a through 29a. The portion quoted above begins on page 21a.

III. THE FEDERAL QUESTION PROPERLY RAISED AND DECIDED IN THE PROCEEDINGS BELOW--DOES THE VERMONT TAX UNCONSTITUTIONALLY DISCRIMINATE AGAINST INTERSTATE COMMERCE BY INCLUDING IN NET INCOME BEFORE APPORTIONMENT, MOBIL'S DIVIDEND INCOME--IS NOT SUBSTANTIAL.

Mobil asserts that its dividend income could be taxed by New York, without apportionment. Therefore, Mobil argues Vermont's law which includes its dividends in net income exposes that income to a risk of multiple taxation. This risk of multiple taxation, Mobil asserts, would discriminate against interstate commerce because the dividend income of an intrastate business would be exposed to no such risk. Such discrimination, Mobil argues, violates the Commerce Clause.

Article 1, Section 8, Clause 3 of the United States Constitution provides that Congress shall have the power "to regulate commerce with foreign Nations and among the several States,...." This Court has interpreted the Commerce Clause as prohibiting state taxes which interfere with or discriminate against interstate commerce.

An inherent conflict exists between the taxing powers and revenue needs of the states and the national interest in promoting a strong national economy by encouraging the free flow of commerce among the states. The decisions of this Court have, of necessity, made practical adjustments in attempting to balance these competing interests.

Although clearly a burden on interstate commerce, state taxes imposed on the unapportioned gross receipts from business activities in the taxing state, or net income apportioned to fairly reflect business activities in the taxing state, have been held constitutional. It is apparent that the risk of multiple taxation and therefore discrimination is inherent in any tax based on the net income of an interstate business, because the same income may be included in the tax base of more than one state. This risk applies equally to all types of income included in net income. To the extent that the same net income is included in the tax base of

more than one state, this Court has held that the resulting discrimination is constitutional if the particular tax in question is imposed only on that portion of net income which fairly reflects business activities within the taxing state. Moorman Manufacturing Co. v. Bair, 437 U.S. 267 (1978). This Court has also held acceptable under the Commerce Clause the risk of multiple taxation present where income of a multistate business is subject to both unapportioned gross receipts taxes and apportioned net income taxes or net income taxes using different methods of apportionment. Id.; Standard Pressed Steel Co. v. Department of Revenue of Washington, 419 US. 560 (1975).

The constitutional test of a tax on unapportioned gross receipts is the source of income sought to be taxed. Such taxes are constitutional only if limited to income directly related to business activities within the taxing

state. The rationale for this constitutional limitation is that any particular component item of income is directly related to business activities in only one state and, therefore, not exposed to the risk of multiple taxation.

> "The vice characteristic of those [gross receipts] taxes which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed (Citations omitted) or added to (Citations omitted) with equal right by every State which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause, it would bear cumulative burdens not imposed on local commerce.[10]

The constitutionality of taxes on apportioned net income is determined by the apportionment of that income. Such taxes are constitutionally valid, if net

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[10] Western Livestock, et al v. Bureau of Revenue, et al, 303 U.S. 250 (1938).

income is apportioned to fairly reflect business activities within the taxing state. The rationale underlying this constitutional test is that apportionment results in allocating each portion of net income to business activities which are local to only one state. As stated by this Court:

> "Logically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice."[11]

Net income merely defines all income subject to tax, without regard to what portion of that income is taxable by any particular state. Apportionment, on the other hand, determines what portion of net income is taxable by each state.

This Court has clearly held that the Commerce Clause permits a State to tax the local activities of an interstate business and to impose its tax on fairly apportioned net income. Mobil argues that the Commerce Clause requires an

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[11] Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).

additional limitation, a type of income test, superimposed on the fair apportionment test appropriate to a tax on net income. This argument is not supported by the decisions of this Court, logic, or common sense. This argument also conveniently ignores the reality that income, without regard to type, is integral to the economic and financial structure and operation of a multistate business.

Mobil asserts that New York, its chosen state of commercial domicile, could constitutionally tax its dividend income, without apportionment. This Court has never held that a state of commercial domicile can tax, without apportionment, the dividend income of a multistate corporation. In view of the competition for corporate headquarters among the states, that case is not likely to be presented for decision. As one commentator has noted:

> "Logically, states such as New York, Pennsylvania, and Massachusetts, which provide corporate domiciles for a preponderance of U.S. Corporations,

> should oppose the [Multistate Tax Commission] because of the Commission's decision to apportion, rather than allocate, most dividend income. However, if these domiciliary states oppose the change from allocation to apportionment of dividends, it is not because of any potential loss of revenue from dividend taxation. Indeed, Pennsylvania and Massachusetts do not even tax such dividends, while New York taxes only a portion. Major domiciliary states have found that ultimately it is more profitable to lure interstate businesses to settle in the state than to tax their dividend income. As an incentive for corporations to locate within them, these states deliberately treat such income specially. Therefore, such states might oppose apportionment of dividends on the theory that this tax incentive would be diluted if they were forced to exempt only their apportioned part of the dividends, rather than total dividends. Even this theory, however, is undercut in

practice: Massachusetts has chosen to apportion dividends, and effectively New York does so. Thus, while businesses still seem united in their desire that dividends be allocated to the state of commercial domicile, the apportionment of such income is probably not a determinative factor of the domiciliary states' coolness toward the MTC."[12]

Although the Appellant's conclusion that the Commerce Clause requires an allocation of 100% of dividend income to the state of commercial domicile is speculative, at best, and economic realities foreclose likelihood that New York will tax 100% of its dividend income, Mobil contends that Vermont's tax on an admittedly fair portion of its net income, including dividends, must be struck down as unconstitutional. Broadly stated, the rule proposed is that the Commerce

[12]Note, State Taxation of Interstate Business and the Multi-State Tax Compact: The Search for a Delicate Uniformity, 11 Columbia Journal of Law and Social Problems, 231, 269 (1975).

Clause precludes a state from including in net income, before apportionment, any component item of income which could be taxed, without apportionment, by another state. The implications of Mobil's argument are far reaching. This Court has already endorsed the validity of a tax on unapportioned gross receipts and net income apportioned by a single factor.[13] Because all states have the constitutional authority to impose such taxes, the economic viability of a tax on the net income of a multistate corporation apportioned to fairly reflect business activities in the taxing state, would effectively be eliminated by Mobil's argument.

Mobil contends that the Vermont Supreme Court held that proof of actual multiple taxation is a sine qua non to the invocation of the multiple taxation doctrine.[14] While it is respectfully sugges-

[13]Standard Pressed Steel Co. v. Department of Revenue of Washington, 419 U.S. 560 (1975); Moorman Manufacturing Co. v. Bair, 437 U.S. 267 (1978).

[14]Jurisdictional Statement, at pages 6 and 7.

ted that even the holding suggested by Mobil would be constitutional under this Court's decision in Moorman, a fair and careful reading of the opinion below reveals a far narrower holding. Specifically, the Vermont Supreme Court held:

> "We do not decide this issue in the case at bar since Mobil has failed to establish on the record that New York has the power to tax investment income without apportionment and hence no risk of multiple taxation is here shown."[15]

The Court below did not hold that Mobil had to prove that New York in fact taxed 100% of its dividend income. It never reached that issue because Mobil failed to establish that the Commerce Clause would permit New York to tax 100% of its dividend income without apportionment.

Mobil has failed to show on the record before this Court that its dividend income was exposed to double taxation. In Moorman, on the other hand, the taxpayer established an actual overlap in the

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[15] Jurisdictional Statement at page 24a. See also, supra, at pages 13 and 14.

taxation of its gross income arising from sales in the taxing state. As to the adequacy of this showing, this Court said:

> "In the first place, this record does not establish the essential factual predicate for a claim of duplicative taxation. Appellant's net income during the years in question was approximately $9 million. Since appellant did not prove the portion derived from sales to Iowa customers, rather than sales to customers in other States, we do not know whether Illinois and Iowa together imposed a tax on more than 100% of the relevant net income. The income figure that appellant contends was subject to duplicative taxation was computed by comparing gross sales in Iowa to total gross sales. As already noted, however, this figure does not represent actual profits earned from Iowa sales. Obviously, all sales are not equally profitable. Sales in Iowa, although only 20% of gross sales, may have yielded a much higher percentage of appellant's profits. Thus, profits from Iowa sales may well have exceeded

the $2.5 million figure that appellant contends was taxed by the two States. If so, there was no duplicative taxation of the net income generated by Iowa sales. In any event, on this record its existence is speculative.

Even assuming some overlap, we could not accept appellant's argument that Iowa, rather than Illinois, was necessarily at fault in a constitutional sense." Moorman Manufacturing Co. v. Bair, 437 U.S. 267, 276 (1978).

It is respectfully suggested that the record before this Court contains no showing of a risk of multiple taxation which discriminates against interstate commerce in a constitutional sense. Under this Court's decision in Moorman, the Vermont tax at issue is well within the permissible constitutional limits imposed by the Commerce Clause. Accordingly, it is respectfully suggested that the question presented by Mobil's multiple taxation claim has been foreclosed by prior decisions of this Court.

CONCLUSION

Mobil failed to properly raise in the proceedings below its claim of extraterritorial taxation in violation of the Due Process Clause and its claim that the foreign source of the dividends at issue is of constitutional significance under the Commerce Clause. Mobil's claim that the Vermont tax exposed its dividend income to a risk of multiple taxation prohibited by the Commerce Clause fails to raise a substantial federal question. For the foregoing reasons, the Appellee's Motion to dismiss this cause or, in the alternative, to affirm the decision below, should be granted.

Dated at Waitsfield, County of Washington and State of Vermont, this 5th day of March, 1979.

Respectfully submitted,

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